FILED
FEB 8 1995
OFFICE OF THE CLERK

(8) (7)

Nos. 94-1119 & 94-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

20TH CENTURY INSURANCE CO., *et al.*,

Petitioners,

v.

CHARLES QUACKENBUSH, Insurance Commissioner of the State of California,

Respondent.

CENTURY-NATIONAL INSURANCE CO., *et al.*,

Petitioners,

v.

CHARLES QUACKENBUSH, Insurance Commissioner of the State of California,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

---

RESPONDENT'S SUPPLEMENTAL BRIEF

MICHAEL J. STRUMWASSER
Counsel of Record
FREDRIC D. WOOCHER
SUSAN L. DURBIN
RALEIGH H. LEVINE
STRUMWASSER & WOOCHER
100 Wilshire Boulevard
Suite 1900
Santa Monica, CA 90401
(310) 576-1233

Counsel for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

BEST AVAILABLE COPY

13pp

TABLE OF AUTHORITIES

CASES

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 10

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 5

American Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985) 6

Berkemer v. McCarthy, 468 U.S. 420 (1984) 6

Church of Scientology v. United States, ___ U.S. ___, 113 S. Ct. 447 (1992) 4

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989) 8

Federal Power Comm'n v. Hope Natural Gas Co.,
320 U.S. 591 (1944) 7, 9

Jersey Central Power & Light Co. v. F.E.R.C.,
810 F.2d 1168 (D.C. Cir. 1987) 8

Kaiser Aetna v. United States, 444 U.S. 164
(1979) 8

Karcher v. May, 484 U.S. 72 (1987) 5

Ex parte Leaf Tobacco Bd. of Trade,
222 U.S. 578 (1911) 5

Maryland Casualty Co. v. Pacific Co.,
312 U.S. 270 (1941) 5

Mills v. Green, 159 U.S. 651 (1895) 4

North Carolina v. Rice, 404 U.S. 244 (1971) 5

Stone v. Powell, 428 U.S. 465 (1976) 6

Yee v. City of Escondido, 503 U.S. ___, 112 S. Ct. 1522 (1992) 6, 8

RULES

Sup. Ct. R. 14.1(a) 2, 6

Sup. Ct. R. 15.7 1

Sup. Ct. R. 46.2 2

Nos. 94-1119 & 94-1120

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

20th CENTURY INSURANCE CO., *et al.*,
Petitioners,
v.
CHARLES QUACKENBUSH, Insurance Commissioner
of the State of California,
Respondent.

CENTURY-NATIONAL INSURANCE CO., *et al.*,
Petitioners,
v.
CHARLES QUACKENBUSH, Insurance Commissioner
of the State of California,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Pursuant to Supreme Court Rule 15.7, Respondent Charles Quackenbush, Insurance Commissioner of the State of California, submits this supplemental brief to advise the Court of a recent development that significantly affects consideration of the pending petitions for a writ of certiorari.

On January 25, 1995, subsequent to the filing of Respondent's Briefs in Opposition, Respondent Commissioner and Petitioners 20th Century Insurance Company and 21st Century Casualty Company (collectively "20th Century") entered into a stipulation resolving the litigation between the parties. Under the settlement, 20th Century has agreed to refund up to $78 million to its 1989 policyholders in full satisfaction of its rollback obligation under Proposition 103

and to withdraw its petition for certiorari before this Court. In accordance with the settlement terms, on January 30, 1995, 20th Century filed a Motion for Dismissal as Petitioner pursuant to Supreme Court Rule 46.2, and the company will begin the process of distributing the first $46 million in rollback checks within 45 days.

The Commissioner's settlement with 20th Century not only moots that insurer's challenge to the California Supreme Court's decision, but removes any ground for this Court to entertain the related petitions for certiorari filed by the other insurers in Nos. 94-1119 and 94-1120. As explained below, 20th Century was the only party with standing to seek certiorari review of the California court's ruling with respect to any as-applied challenge to the Commissioner's regulations or 20th Century's rollback order. The only portion of the decision below which survives 20th Century's withdrawal—a facial challenge to the constitutionality of the regulations' treatment of surplus—is neither "fairly included" within the question presented by these petitions, Sup. Ct. R. 14.1(a), nor remotely worthy of this Court's review. The petitions for a writ of certiorari should be denied.

1. The petitions for a writ of certiorari in No. 94-1119 and in No. 94-1120 both seek review of the decision of the California Supreme Court in *20th Century Insurance Co. v. Garamendi*, 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994), upholding the constitutionality of 20th Century's rollback order and of the regulations adopted by the Commissioner to calculate the rollback rate. As noted in the California Supreme Court's opinion, (App. 3a-5a), that decision actually resolved appeals in three separate actions that had been consolidated in part by the Superior Court:

i. 20th Century Ins. Co., et al. v. Garamendi (San Francisco Superior Court No. 938470) ("*20th Century I*"), a complaint for declaratory and injunctive relief filed by 20th Century prior to any administrative adjudication of its rollback obligation, challenging the facial validity of the Commissioner's regulations on

various constitutional and state-law statutory grounds. (App. 3a-4a, 149a.)

ii. 20th Century Ins. Co., et al. v. Garamendi (Los Angeles Superior Court No. BS 016789) ("*20th Century II*"), a petition for writ of mandate filed by 20th Century seeking to set aside the Commissioner's order directing the company to refund to its policyholders $78 million, plus interest, and challenging the validity of various provisions of the Commissioner's regulations as applied to 20th Century in the rollback order. (App. 4a, 150a.)

iii. Hartford Steam Boiler Inspection & Ins. Co., et al. v. Garamendi (Los Angeles Superior Court No. BC023983) ("*Hartford Steam*"), a lawsuit filed by scores of insurers seeking initially to prevent Commissioner Garamendi from proceeding to adjudicate their rollback liability pursuant to his regulations and challenging the validity of those regulations on their face, including the generic determinations and the procedures by which the regulations were adopted. (App. 4a-5a, 147a, 150a.)

At the outset of the trial in the Superior Court, certain of the *Hartford Steam* plaintiffs moved to have their lawsuit consolidated with the *20th Century* litigation. (App. in Cal. S. Ct. at 3672-3775.) Both 20th Century and the Commissioner opposed consolidation, on the grounds that it would unduly complicate and broaden the scope of the *20th Century* case and that the *Hartford Steam* plaintiffs' claims were not ripe, none of them yet having completed an administrative hearing to determine their rollback liability under the Commissioner's regulations. (*See id.* at 3776-87, 3799-3876.)

After considering the matter at two separate hearings, the Superior Court ultimately decided to bifurcate the *Hartford Steam* action and to grant consolidation with respect to only one specific, limited issue: "Whether the Regulations and the Formula disregard a portion of insurers' capital and thereby deny them a fair and reasonable return ('the leverage

issue')." (*Id.* at 4789-90, 5075-82; *see* App. 4a, 150a.) The *Hartford Steam* plaintiffs (including the State Farm Petitioners in No. 94-1119 and the Century-National Petitioners in No. 94-1120) were allowed to file briefs and to participate in the *20th Century* case as amici curiae with respect to those issues not consolidated. (App. 150a.) The *Hartford Steam* parties appeared in that dual plaintiffs/amici status in the California Supreme Court, as well.[1]

2. 20th Century's settlement of its rollback obligation and withdrawal from further proceedings in this Court unquestionably render moot 20th Century's petition for a writ of certiorari in No. 94-1119. Clearly, there is no longer a case or controversy between 20th Century and the Commissioner. Beyond that, however, the settlement of 20th Century's rollback liability removes the basis for this Court's review of the as-applied issues raised by *any* of the petitions seeking review of the California Supreme Court's decision in the *20th Century* case.

It is a fundamental premise of federal jurisdiction that "a court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States*, ___ U.S. ___, 113 S. Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Court's judgments must resolve "'a real and substantial controversy admitting of specific

---

[1]Voter Revolt, the consumer-advocacy organization, and a single insurer, Allstate Insurance Company, both of which had participated as intervenors in 20th Century's administrative hearing, were granted leave to intervene in the *20th Century* case by the Superior Court. (App. 4a.) While the case was pending before the Supreme Court, however, Allstate reached a settlement with the Commissioner of its rollback obligation and was dismissed as a party to the proceeding. (App. 43a n.8; *see* Letter of Jan. 5, 1995 from Allstate counsel Marc Fairman to Hon. William K. Suter (advising that the Allstate companies are not parties to the Petition for Writ of Certiorari in No. 94-1119).)

relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

When presented to the California Supreme Court, and initially to this Court upon the petitions in Nos. 94-1119 and 94-1120, the insurers' legal arguments were advanced in the context of a concrete controversy between 20th Century and the Commissioner, involving a specific rollback order directed to that company. The controversy underlying the *20th Century* lawsuit has now been resolved, however, leaving the remaining insurers to seek from this Court precisely the "advisory opinion" that is proscribed by more than a century of established federal jurisprudence. Even the facial challenges to the Commissioner's rollback regulations subsumed in the *20th Century I* complaint have now been so divorced from any concrete set of facts that the case is lacking the "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270, 273 (1941).

Moreover, none of the other insurers has standing to seek a writ of certiorari on the cost-of-capital question from the *20th Century* decision. As recounted above, the State Farm and Century-National Petitioners were never parties in the *20th Century* (as opposed to the *Hartford Steam*) case; they participated only as amici curiae in that case.[2] It is well established that "one who is not a party to a record and judgment is not entitled to appeal therefrom." *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911); *accord Karcher v. May*, 484 U.S. 72, 77 (1987). Since the remaining Petitioners in Nos. 94-1119 and 94-1120 were not parties

---

[2]Indeed, the *Hartford Steam* plaintiffs' motion to intervene as parties in the *20th Century* case was expressly denied by the Superior Court, and no appeal was taken from that ruling. (App. in Cal. S. Ct. at 4638.)

to the *20th Century* case, they cannot independently pursue an appeal from those aspects of the California Supreme Court's decision relating only to 20th Century's claims, including its ruling on the cost of capital question presented in these two petitions for certiorari.

3. The State Farm and Century-National Petitioners were concededly parties to the *Hartford Steam* litigation, and they would be entitled to appeal from that portion of the California Supreme Court's decision addressing the one issue from the *Hartford Steam* case that had been consolidated with *20th Century*. But that issue—whether the Commissioner's regulations on their face deny insurers a fair rate of return by limiting the capital upon which the authorized return may be earned to the amount of surplus that is "used and useful" in their insurance operations—is neither properly presented nor worthy of this Court's certiorari review.

It has long been the Court's policy to limit its consideration to the questions presented for review in the petition for a writ of certiorari, or to those "subsidiary question[s] fairly included therein." Sup. Ct. R. 14.1(a). *See, e.g., Berkemer v. McCarthy*, 468 U.S. 420, 443 n.38 (1984); *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976) (rule to be disregarded "only in the most exceptional cases"). Only recently, in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992), the Court underscored the importance of that limitation to the integrity of the judicial function and to the efficient utilization of the Court's limited resources. 112 S. Ct. at 1532-33.

In this case, the "leverage" issue as framed by the *Hartford Steam* plaintiffs and considered by the courts below was not set forth in the petitions for certiorari in Nos. 94-1119 and 94-1120, nor can it be viewed as "fairly included therein." *See generally American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 608 (1985). Both of those petitions seek review of a single aspect of the California Supreme Court's decision: whether a rate order denying an insurer its supposed cost of capital constitutes an unconstitu-

tional confiscation of its property.[3] None of the insurers has challenged the decision's ruling upholding the regulations' incorporation of imputed leverage factors. Although the two issues may in a sense be viewed as complementary,[4] the cost-of-capital question is theoretically and legally distinct from the surplus issue consolidated into the *20th Century* case, as evidenced by the California Supreme Court's discussion of the two points in separate sections of its opinion. (See App. 89a-90a, 100a-103a.) A fair reading of the petitions of both 20th Century and Century-National makes clear the theory Petitioners were urging: that the authorized rate of return was confiscatory because it was below 20th Century's claimed cost of capital. Without 20th Century's evidence that formed the basis of its (disputed) claim, there is no record of *any* insurer having a cost of capital higher than that specified in the regulations—and no record on which to reach the remaining insurers' rate-of-return argument.

Even if the petitions could be read to "fairly include[]" the leverage issue on which the remaining insurers were parties below, the lower court's decision on the leverage issue is wholly unworthy of this Court's certiorari review. Since this Court's decision in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), it has been clear that regulators may define the capital base on which a return is authorized. Further, it is unquestionably appropri-

---

[3]The Petitioners in 94-1120 do tender another, albeit wholly frivolous, issue: whether it would have been unconstitutional for the regulations to use non-jurisdictional income to offset jurisdictional losses. As explained in Respondent's Brief in Opposition in 94-1120, the regulations are expressly limited to each insurer's California business. (Resp't's Br. in Opp'n at 16-17.)

[4]As the California Supreme Court observed, "the leverage factor indirectly contributes to the setting of the rate itself by inverse relationship: the higher the leverage ratio, the smaller the used-and-useful capital and hence the smaller the rate; the lower the leverage ratio, the greater the used-and-useful capital and hence the greater the rate." (App. 100a.)

ate to limit that capital to an amount that is determined to be "used and useful" in rendering services to the public. *E.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Jersey Central Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1175 (D.C. Cir. 1987). Application of these accepted principles to the insurance business plainly authorizes the Commissioner to determine, through the use of leverage ratios, the amount of surplus that is actually called upon to support an insurer's operations, and upon which the insurer is therefore entitled to earn a return from its policyholders. As the opinion below recognized, "under-leverage (or overcapitalization) threatens undue profit: there is surplus beyond what is useful to back up premiums—surplus surplus—which inflates the insurer's capital base and any rate set thereon to the disadvantage of its insureds, while at the same time it produces investment income from appreciating assets." (App. 4a.)[5]

4. Finally, 20th Century's settlement and withdrawal of its challenge to the Commissioner's regulations and rollback order serve to underscore the lack of ripeness in the other insurers' petitions. At best, all that remains of this litigation is a facial challenge to some portion of the Commissioner's regulations. But as this Court has repeatedly emphasized, analysis of regulatory takings claims require "essentially ad hoc, factual inquiries," and they are thus uniquely unsuited to facial challenges. *E.g.*, *Yee v. City of Escondido*, 503 U.S. at ___, 112 S. Ct. at 1529; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). That is especially so in

---

[5]To be sure, the non-recognition of a portion of an insurer's surplus may, "[a]t the margins, . . . have constitutional overtones," *Duquesne Light Co.*, 488 U.S. at 310, but a claim to that effect could scarcely be resolved in a facial challenge, such as presented by these Petitioners. That is particularly so in this case, because—as the California Supreme Court emphasized—the return an insurer is denied on the nonrecognized surplus is offset by the regulations' failure to include in the ratemaking formula the investment income realized by the insurer on that same excluded surplus. (App. 73a-74a, 101a.)

reviewing the constitutionality of rate orders, where "[i]t is not theory, but the impact of the rate order which counts." *Hope Natural Gas*, 320 U.S. at 602. Yet with 20th Century's settlement of its rollback, the State Farm and Century-National Petitioners are left with no "impact" to complain about, only the "theory" to be employed in arriving at a future result.

On their face, the Commissioner's regulations cannot be said to be confiscatory, for they explicitly guarantee an insurer a "minimum nonconfiscatory rate," and provide for variances as the final mechanism for rate adjustments necessary to avoid confiscation. (App. 24a, 84a-85a, 102a.) Without any record showing the "end result" of the regulations' operation on them, the remaining Petitioners likewise cannot possibly hope to prove confiscation as applied.[6] Indeed, given that the Commissioner's regulations govern a one-time event and that many insurers have now resolved their rollback liability through settlements, it is doubtful whether the question presented in these petitions will ever even arise again, much less on the record of an insurer claiming a constitutional entitlement to a cost-of-capital of more than 20%, double the industry-average 10% rate of return. (App. 27a.)

The case these Petitioners sought to bring to this Court was a rate order to 20th Century, yielding an end-result of a 10% return on equity for one year. Petitioners' claim was that the 10% profit was confiscatory in the face of evidence that they claimed showed the company to have a cost of capital in excess of 20%. 20th Century is now gone, and

---

[6]Petitioners lack not only a record of how the regulations would be applied, they also lack a record of how the regulations were adopted. The extensive rulemaking file compiled in the process of adopting the regulations is not a part of the record below. Thus, Petitioners would have this Court conduct a facial review of the regulations without the record containing the public's comments on the regulations and the agency's statement of reasons for their adoption.

with it any arguable evidentiary claim about any firm's cost of capital and end result. Under these circumstances, there is no basis for the Court to entertain the petitions for writ of certiorari. The petitions should be denied and the judgment of the California Supreme Court left undisturbed. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989).

Respectfully submitted,

MICHAEL J. STRUMWASSER
Counsel of Record
FREDRIC D. WOOCHER
SUSAN L. DURBIN
RALEIGH H. LEVINE
STRUMWASSER & WOOCHER
100 Wilshire Blvd., Ste. 1900
Santa Monica, CA 90401
(310) 576-1233
Counsel for Respondent

February 8, 1995